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No. 09-1490

Supreme Court, U.S.
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In The

Supreme Court of the United States

GEORGE LOUIS GARCIA,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Supreme Court

REPLY BRIEF

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State courts are in conflict as to whether this court has abandoned *In re Ruffalo*

Some states follow *In re Ruffalo*, 390 U.S. 544 (1968) and hold that lawyer disciplinary hearings are quasi-criminal, forbidding any adverse inference from Fifth Amendment silence.[1]

Other states hold that lawyer disciplinary hearings are civil, disregarding this court's precedent in *In re Ruffalo*, permitting an adverse inference from Fifth Amendment silence.[2]

Respondent makes no mention of this dramatic conflict among the high courts of many states.

Respondent relies on *Baxter v. Palmigiano*, 425 U.S. 308 (1976) and asserts lawyer disciplinary hearings "are similar type disciplinary hearings

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[1] *In re Silverberg*, 327 A.2d 106 (Pa. 1974); *Attorney Grievance Comm'n v. Unnamed Attorney*, 467 A.2d 517 (Md. 1972); *State ex rel. Oklahoma Bar Ass'n v. Wilcox*, 942 P.2d 205 (Okla. 1997); *In re Regan*, 885 So.2d 514 (La. 2004); *In re March*, 376 N.E.2d 213 (Ill.1978); *State Bar of Michigan v. Block*, 158 N.W.2d 49 (Mich. Ct. App. 1968); *Akinaka v. Disciplinary Bd. of Hawai'i*, 979 P.2d 1077 (Haw. 1999). *See also*, *Fischer v. Hooper*, 732 A.2d 396 (N.H. 1999) (forbidding adverse inferences from Fifth Amendment silence in all evidentiary proceedings).

[2] *State v. Postorino*, 193 N.W.2d 1 (Wis. 1972); *State v. Horton*, 561 A.2d 488 (Me. 1989); *Matter of Meier*, 344 S.E.2d 212 (Ga. 1986); *In re Snyder*, 71 A.D.3d 140 (N.Y. App. Div. 1 2010).

where Fifth Amendment silence does not, by itself, result in automatic sanction." Brief in Opposition ("Opp.") 9.

Baxter is distinguishable since this court specifically found that parole hearings are civil proceedings and not quasi-criminal. It must also be remembered that convicted felons are not accorded the same rights and status as attorneys who are officers of the court charged with protecting the Constitutional rights of fellow citizens.[3]

When does an adverse inference from Fifth Amendment silence become impermissible coercion in governmental civil disciplinary hearings

Ignoring the quasi-criminal nature of lawyer discipline and focusing on civil proceedings, the complicated question is when does government involvement in a disciplinary proceeding rise to the level of coercion such that constitutional protections inure?

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[3] Lawyers are confronted with ethical issues more frequently than other professions, thus "Hotlines" are provided by some Bar associations. *E.g.*, <http://www.floridabar.org/> Lawyers and Fifth Amendment silence is akin to the necessity of immunizations for health care workers due to the proximity to disease.

Essentially every enforcement action involving a license or government related employment falls into this grey area. The Securities and Exchange Commission in enforcement actions and the Department of Justice in corporate criminal investigations specifically seek litigation advantages by coercing individuals to waive Fifth Amendment rights. Brief of Pet. 11, n. 13. *See also*, Susan E. Brune, *White Collar Crime Policy*, *in Champion*, 34-APR CHAMP 43 (National Association of Criminal Defense Lawyers, Inc., 2010) ("the Division of Enforcement staff is to be substituted into the role of the U.S. Attorney's Office, negotiating cooperation, non-prosecution and deferred prosecution agreements").

The issue in the case before the court wherein the burden of proof was "clear and convincing"[4] evidence and the referee found a "compelling" adverse inference from the invocation of Fifth Amendment silence, in addition to "ample affirmative evidence" of guilt (Appendix ("App.") 11, 14), resides in this confusing grey area bounded by two lines of cases.

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[4] This has been the burden of proof for lawyer disciplinary hearings in Florida for decades. *The Florida Bar v. Schonbrun*, 257 So.2d 6 (Fla. 1971), *see also The Florida Bar v. Shankman*, 41 So.3d 166 (Fla. 2010).

The first line of cases forbids an adverse inference from Fifth Amendment silence when the punishment is automatic or the only evidence for guilt is the invocation of the Fifth Amendment.[5] One state even forbids adverse inferences from Fifth Amendment silence in all proceedings. *Fischer v. Hooper*, 732 A.2d 396 (N.H. 1999).

The second line follows *Baxter*, finding that adverse inferences are permissible in civil proceedings.

The two cases following *Baxter* and cited by Respondent as support for the Report of Referee in the case before the court are inapplicable, but these cases do illustrate that the dividing line

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[5] *Spevack v. Klein*, 385 U.S. 511 (1967) (Fifth Amendment silence alone prohibits disbarment); *Slochower v. Board of Education*, 350 U.S. 551 (1956) (a teacher may not be dismissed solely for exercising Fifth Amendment silence); *Garrity v. New Jersey*, 385 U.S. 493 (1967) (a police officer compelled by threat of termination to waive Fifth Amendment rights was determined to be impermissible); *Gardner v. Broderick*, 392 U.S. 273 (1968) (a police officer may not be terminated for refusing to waive Fifth Amendment rights); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (state law unconstitutional for proscribing a five year ban from holding party or political office if Fifth Amendment rights had been asserted).

between permissible inference and impermissible coercion, is unsettled. Opp. 12.[6]

This area of law needs clarification by this court.

Reply to specific issues raised in Brief in Opposition

Respondent mischaracterizes the issues raised by Petitioner, who never asserted "constitutional rights, are to be applied with full force in lawyer disciplinary hearings as in a criminal trial." Opp. 3, 4, 5.

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[6] Respondent cites *McGuire v. Department of Treasury*, 915 F.2d 1583 (Fed. Cir. 1990), an unreported opinion, as an example of a permissible adverse inference from Fifth Amendment silence. McGuire gave testimony on two prior occasions denying that he had abused drugs and then invoked his Fifth Amendment right at hearing. Thus the adverse inference went more to the credibility of McGuire's prior denials, as opposed to a quantum of guilt as in the case before the court.

Respondent also cites *United States v. Stein*, 233 F.3d 6 (1st Cir. 2000) for the proposition that an adverse inference from Fifth Amendment silence is permissible in lawyer disciplinary hearings. *Stein* is dicta and involves appellate application of the clear error standard of appellate review to findings in a Motion to Suppress in a criminal case wherein the defendant lawyer failed to object to the admission of a years prior deposition given to a state bar association. The Motion to Suppress argued that the deposition was coercive because an adverse inference might have been inferred if the lawyer had not testified.

The rationale of *Stein* and the unreported decision in *McGuire* do point to the need for this court to clarify the dividing line between a permissible adverse inference from Fifth Amendment silence and impermissible coercion.

Respondent mischaracterizes the Report of Referee in describing the quantum of evidence of guilt found by the Referee. The Referee never made a finding that the evidence of guilt was "overwhelming" as Respondent attempts to imply in its brief. Opp. 6. Instead the Referee found there was "ample affirmative evidence to support this conclusion. In addition, because the Respondent chose not to testify and explain the transactions or contradict the testimony of Martin, the additional negative inferences are compelling." (App. 14, *See*, 11) Thus ample evidence (not overwhelming evidence) alone did not suffice to prove guilt by clear and convincing evidence. The adverse inference was a significant portion of the proof needed to disbar Petitioner. This is also evident by the fact that the violation for which Petitioner was disbarred was relatively minor. Petitioner was found guilty of contact with a trust account while suspended, though the same level of contact is permissible for the law office bookkeeper.

There can be no argument that the adverse inference from Petitioner's exercise of his Fifth Amendment right to silence was harmless error, as Respondent asserts in their brief. Opp. 12. A harmless error determination would require a review of the complete record that comprises several full days of testimony and numerous exhibits, not a review of a Recommendation of Referee. This is especially true given the two references to the "compelling" adverse inferences from Fifth Amendment

silence cited by the Referee (App. 11, 14) and the onerous clear and convincing burden of proof required for disciplinary action.

CONCLUSION

This court should grant the Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

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